

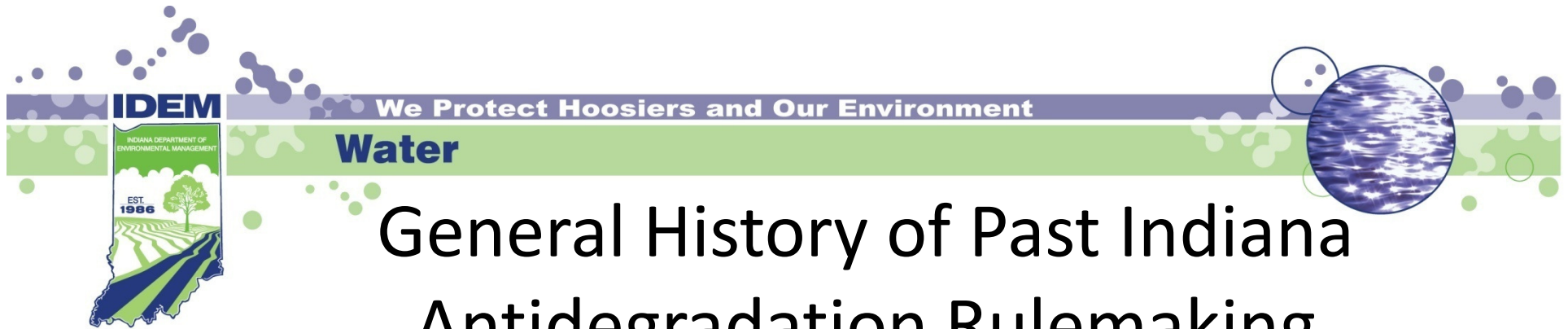
Antidegradation Standards and Implementation Procedures

Overview of Third Notice
Comments and Responses
March 14, 2012



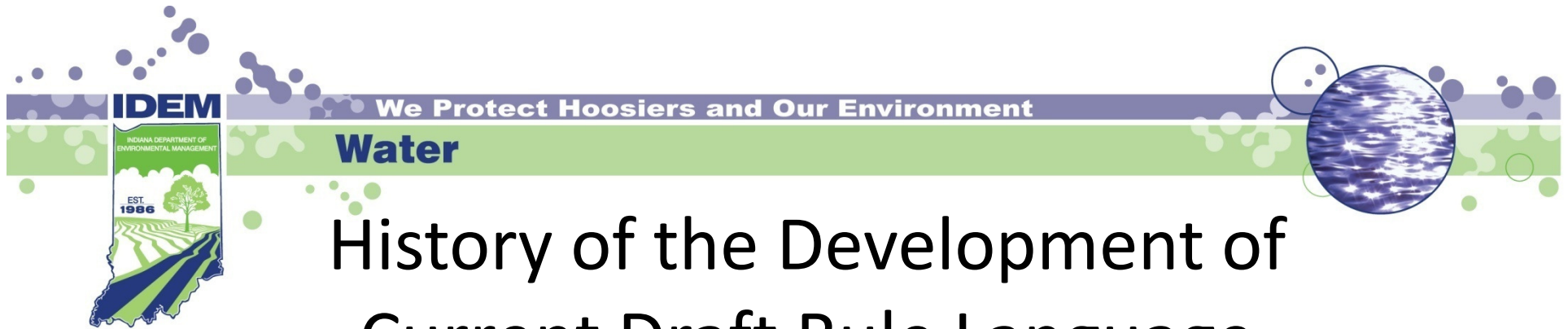
Why Antidegradation Now?

- The first antidegradation policy statement was released on February 8, 1968, by the Secretary of the U.S. Department of the Interior. It was included in U.S. EPA's first Water Quality Standards Regulation (40 CFR 130.17, 40 F.R. 55340-41, November 28, 1975), and was slightly refined and re-promulgated as part of the current program regulation published on November 8, 1983 (48 F.R. 51400, 40 CFR 131.12).
- § 131.12 Antidegradation policy:(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart.
- To date, statewide antidegradation policy and implementation development in Indiana has been a 37+ year process.



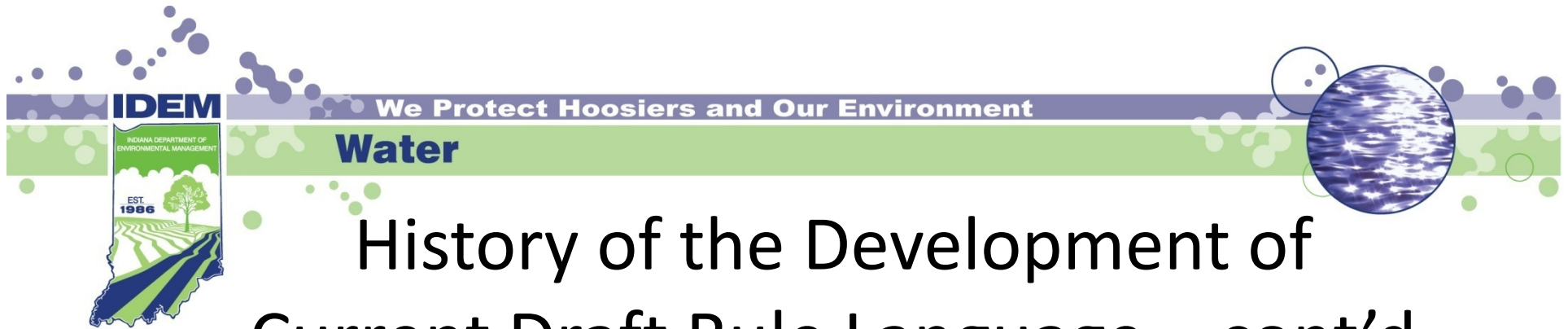
General History of Past Indiana Antidegradation Rulemaking

- **1970s** - Indiana's Stream Pollution Control Board adopted rules that established an antidegradation policy for all waters as part of the Water Quality Standards.
- **1997** - Indiana's Water Pollution Control Board adopted, as part of the Great Lakes Initiative, rules that established antidegradation implementation procedures for the Great Lakes Basin ONLY.
- **1997 - 2002** - IDEM made various attempts to establish a workgroup to work on antidegradation issues.
- **2002 - 2005** - IDEM worked on draft rule language, but determined the April 1, 2005 second noticed draft would be difficult to implement.



History of the Development of Current Draft Rule Language

- **March 7, 2008** - Governor's Stakeholder meeting.
- **April 29, 2008 and June 25, 2008** - Meetings held for all stakeholders.
- **October 15, 2008 - November 14, 2008** - First Notice Comment Period.
- **July 2008 - January 2009** - Subgroup representing major stakeholder groups (industrial, environmental, and municipal) met to discuss key issues.
- **January 2009 - July 2009** - IDEM evaluated input from subgroup and developed draft language for second notice of rulemaking.
- **August 2009 - September 2009** - IDEM held five public meetings throughout the state (Indianapolis, Portage, Garrett, Seymour, Vincennes) to present the key elements of the rule.
- **December 16, 2009 - January 30, 2010** - Second Notice Comment Period.
- **February 2010 - May 2011** - Compiled, reviewed comments, responded to comments, prepared fiscal impact analysis, revised draft rule language.
- **May 9, 2011** - Revised draft rule language circulated to stakeholders.



History of the Development of Current Draft Rule Language – cont'd

- **June 9, 2011** - IDEM met with environmental stakeholders.
- **June 16, 2011** - IDEM met with industrial stakeholders.
- **June 30, 2011** - IDEM met with municipal stakeholders.
- **July 27, 2011** - IDEM requested WPCB to preliminary adopt rule.
- **July 27, 2011** - WPCB appointed two members to work on draft rule prior to preliminary adoption.
- **August 2, 9, and 23, 2011** - IDEM met with WPCB appointees and draft rule revised.
- **August 31, 2011** - Revised draft rule language circulated to stakeholders.
- **September 14, 2011** - WPCB preliminarily adopted rule.
- **December 7, 2011 - December 30, 2011** - Third Notice of Comment.
- **January 2012 - February 2012** - Compiled, reviewed and responded to comments, revised rule.
- **March 2, 2012** - Revised rule language circulated to stakeholders.



Summary of Responses to Comments and Rule Revisions

- IDEM received written comments from 15 parties.
- IDEM appreciates the time and effort that went into preparing and submitting comments.
- All comments were seriously considered.



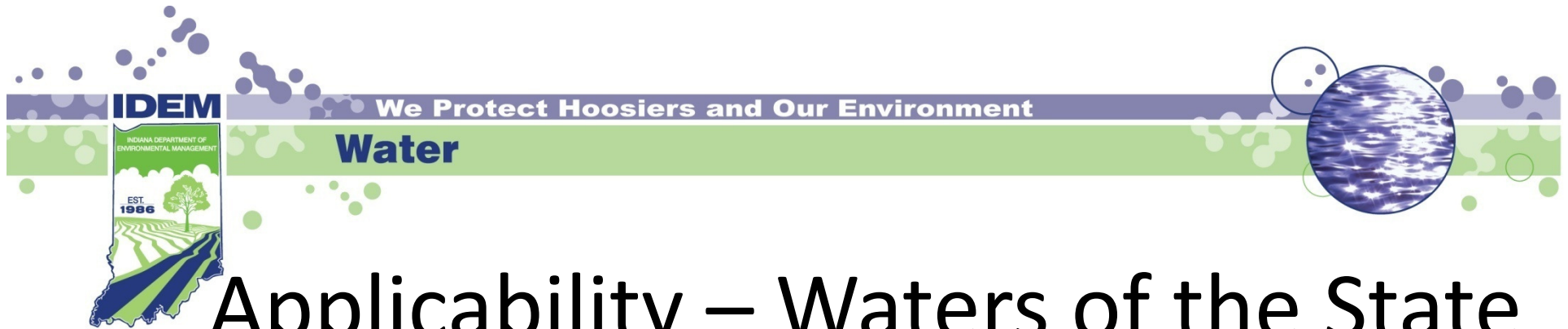
Applicability – Increased Loadings

Comment: Should apply to NPDES discharges only.

Response: To comply with the Clean Water Act, antidegradation implementation procedures apply to those activities over which IDEM has regulatory authority.

- To protect water quality, any regulated action that is required to comply with WQS must comply with antidegradation.
- Any state rule that restricts the applicability of antidegradation to NPDES only would be inconsistent with the concept of WQS as used in the CWA and Federal regulations.

Results: No revisions to the proposed applicability section language.



Applicability – Waters of the State

Comment: Making it apply “subject to the CWA” limits it to waters of the U.S.

Response: The rule applies to waters of the state and activities subject to the CWA. Referencing CWA activities is important as most agriculture related activities are exempt from the CWA.

Results: No revisions to the proposed applicability section language.



Comment: Antidegradation applies to 401 water quality certifications.

Response: IDEM agrees and believes the 401 water quality certification requirements to avoid, minimize, and mitigate for impacts from loadings of fill, when applied properly, result in loadings that are not a significant lowering of water quality and, therefore, satisfy antidegradation.



Applicability – General Permits

Comment: IDEM's antidegradation review of a general permit (GP) should ensure the GP is protective and a separate antidegradation demonstration should not be required for a notice of intent submitted for coverage under a GP.

Response: IDEM agrees and will follow appropriate rules in developing an antidegradation review of its general permits.



Definitions

Comment: Definitions should be consistent within state statute and rules.

Response: If there is a statutory definition, definitions were changed to simply reference the statutory citation.



Definition – Discharge

Comment: The definition of discharge is not appropriate.

Response: Review of the rule demonstrated that the proposed definition of “discharge” was not useful and the definition is removed from the proposed rule language. Most references to “discharge” changed to “loading.”



Definition – Endangered or Threatened Species

Comment: The definition should include critical habitat and state endangered or threatened species.

Response: IDEM agrees and the proposed rule is revised to include critical habitat and state endangered or threatened species in the definition.



Definition – Regulated Pollutant

Comment: Should not include narrative criteria.

Response: Narrative criteria must be included.

- Numeric criteria and narrative criteria identify the level of water quality that must be maintained in surface waters to protect uses.
- Numeric and narrative criteria are equal and equally applicable to surface waters.

Results: No revisions to the proposed definition.

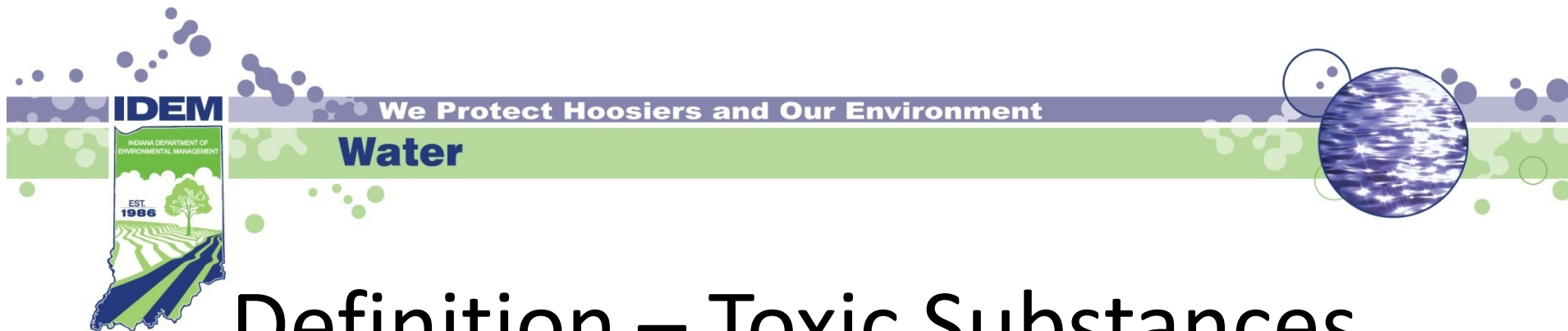


Definition – Regulated Pollutant

Comment: If the definition includes narrative criteria, it should not specify nutrients

Response: It is important that it is clear that phosphorus and nitrogen are regulated pollutants.

Results: No revisions to the proposed definition.



Definition – Toxic Substances

Comment: Because it refers to substances that “may become” harmful, it is vague.

Response: The definition further qualifies that included substances are those “present in sufficient concentrations or combinations” and references substances identified as toxic in the CWA.

Results: No revisions to the proposed definition.



Definition – Wastewater

Comment: The definition used is inappropriate for this rule.

Response: IDEM agrees and the proposed rule is revised to define “wastewater” as liquid or water-carried wastes from industrial, municipal, agricultural, or other sources.



Antidegradation Standards

Comment: the wording of the antidegradation standards is not consistent.

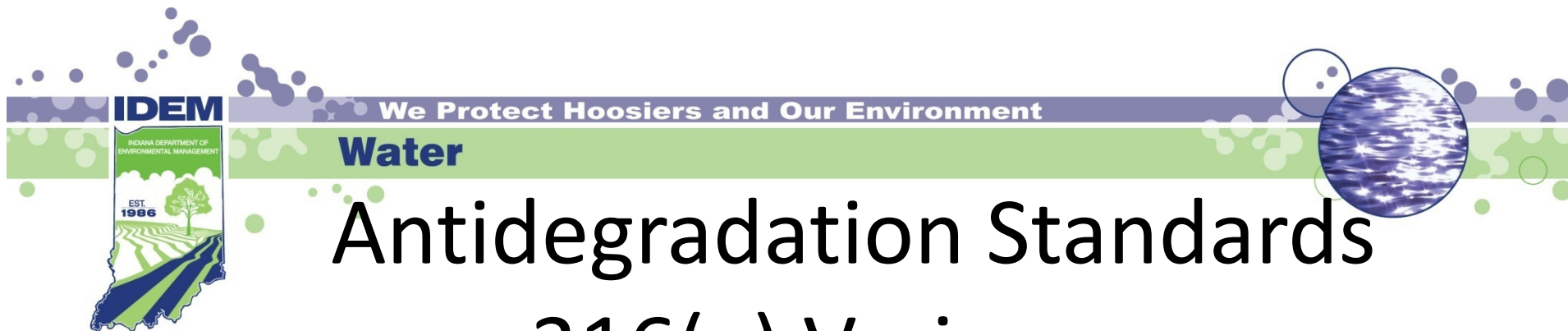
Response: IDEM agrees and minor changes were made to consistently reference “criterion” as a component of the standards and to reference increased “loading” rather than “discharge.”



Antidegradation Standards OSRWs

Comment: Partial list of OSRWs will be lost when current rules are superseded by this rule.

Response: List of OSRWs was added to Sec. 3 (Antidegradation Standards) of the rule.



Antidegradation Standards

316(a) Variances

Comment: 316(a) variances should not be subject to antidegradation review even when impacting waters designated as ONRWs.

Response: The antidegradation standard is consistent with federal regulation which only allows for temporary reductions in water quality in ONRWs.

- For waters other than ONRWS, the 316(a) variance satisfies the antidegradation requirements.
- There are no designated ONRWs in Indiana.

Results: No revisions to the proposed language.



Exemptions

Comment: Exemptions should apply to the WQ improvement project/fee requirements along with the antidegradation demonstration requirements.

Response: IDEM agrees. Exemptions are non-significant loadings and therefore should not have to implement or fund a WQ improvement project.



Exemptions – BCCs/Mercury

Comment: BCCs/Mercury should not be exempt.

Response: The proposed rule does allow for some exemptions which may include BCCs , including mercury.

- The proposed rule does not allow for a de minimis lowering of water quality for any BCC, including mercury.
- Any new or increased loading of a BCC, including mercury, is a significant lowering of water quality requiring some level of an antidegradation demonstration unless it is an exempt, short-term, temporary loading or a parameter already limited in a permit (Sec. 4(c)(2)).

Results: No revisions to the proposed language.



Exemptions – De Minimis

Comment: The benchmark available loading capacity or cumulative cap on de minimis is too stringent.

Response: It is appropriate to establish a benchmark available loading capacity equal to 90% (which translates to a cumulative cap of 10%) of the available loading capacity as a de minimis.

- Any less restrictive alternative would likely not be approved by U.S. EPA.
- Additional flow is calculated into load allocations.

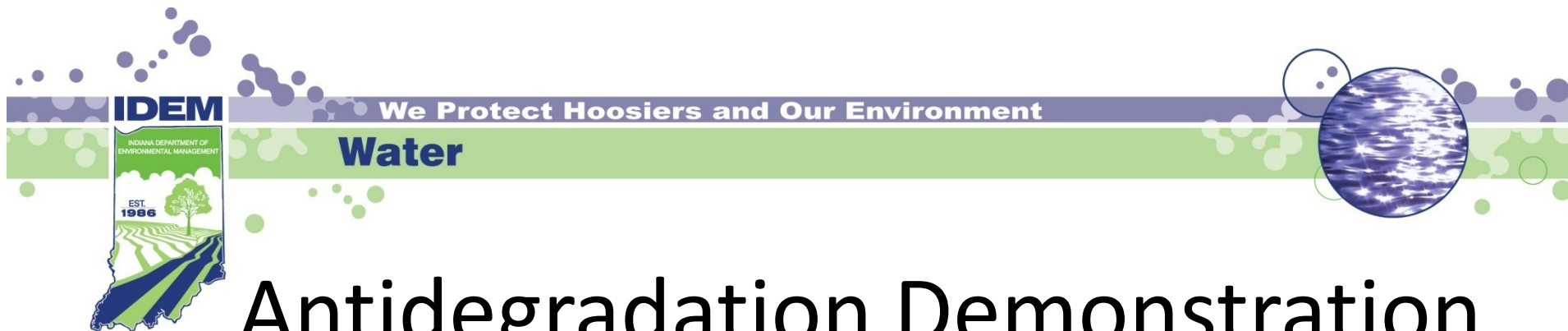
Results: No revisions to the proposed language.



Exemptions/Antidegradation Demonstration

Comment: The rule should be clear that the exempt activities in Section 4 are exempt from all components of the antidegradation demonstration.

Response: IDEM agrees. Exemptions are non-significant loadings and are exempt from all components of the antidegradation demonstration.



Antidegradation Demonstration

Comment: The requirements for the demonstration are too burdensome.

Response: The requirements are not too burdensome.

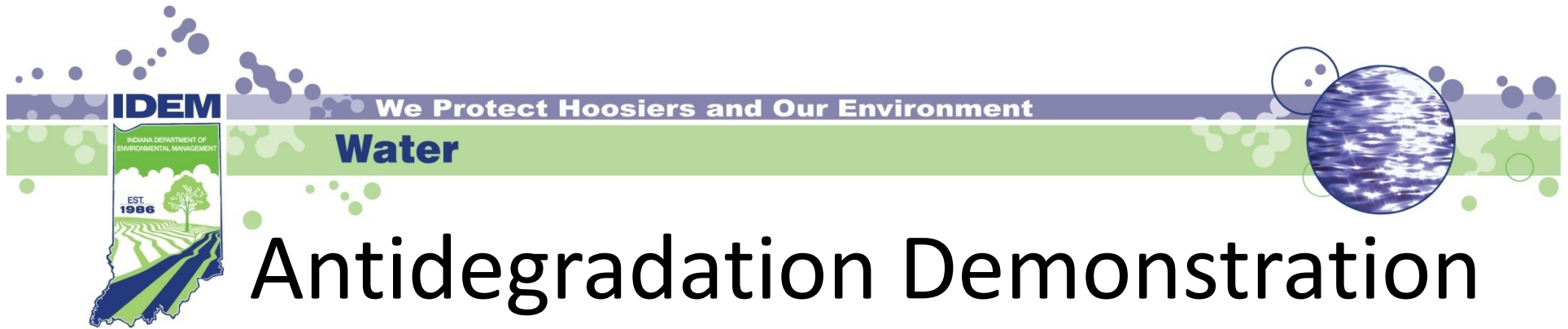
- It is appropriate for those proposing new or increased loadings to justify that degrading loadings are necessary and accommodate important social or economic benefit.
- Those proposing new or increased loadings have much of the information needed to develop an antidegradation demonstration readily available.



Antidegradation Demonstration

Comment: The requirements for the demonstration are too vague.

Response: The proposed rule allows for flexibility in terms of the information submitted and that flexibility allows entities to better tailor demonstrations to their specific situations.



Antidegradation Demonstration

Comment: Variances should be exempt from the antidegradation demonstration.

Response: Variances should not be exempt.

- Information for a variance application may be similar but does not automatically satisfy the antidegradation demonstration requirements.
- IDEM does not expect the same information for a variance to be repackaged, but supplemented, when necessary, to complete the antidegradation demonstration.



Antidegradation Demonstration

Comment: Certain “beneficial” activities should be required to complete a social/economic analysis.

Response: Environmentally beneficial activities (even BCCs) should not be required to complete a social and economic analysis.

- It is appropriate for these types activities to submit basic information on the nature and location of the proposed loading and a demonstration that the loading is necessary.
- These activities are not wholly exempt from the antidegradation requirements as they were in prior drafts.



Antidegradation Demonstration

Comment: The rule should expressly state that regional impacts can be considered in the social economic analysis.

Response: The economic and social factors listed for evaluation in an antidegradation demonstration are those identified in statute and allow for the submission of additional factors including information on regional and state level impacts.

Results: No revisions to the proposed language.



Best Available Demonstrated Control Technology (BADCT)

Comment: It is unclear what process IDEM will use to establish, review, and update BADCT and the BADCT limits may be unreasonable.

Response: IDEM recognizes BADCT as a useful tool.

- The agency wants the option to have the BADCT tool available.
- When establishing BADCT, IDEM will seek input and feedback from U.S. EPA and other stakeholders.



Commissioner's Determination

Comment: For NPDES, the final determination should be the determination issued as part of the final permit following comment.

Response: IDEM agrees and the proposed rule is revised to clarify that the commissioner's determination is tentative until the final control document (if there is one) relative to the increased loading is issued.



Water Quality Improvement Projects/Payments

Comment: If a person impacting an OSRW (loading above de minimis) chooses to pay a fee to the OSRW improvement fund, they should not have to also identify a WQ improvement project.

Response: IDEM agrees and the proposed rule is revised to clarify that either a project or a payment is required, not both.



Why Not Antidegradation Now?

Comment: It is critical that the Water Pollution Control Board (WPCB) avoid further delay in the adoption of the antidegradation rules.

Response: IDEM agrees.